IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 112

W. E. FLOYD, ET AL

vs.

J. T. EGGLESTON, ET AL

Reply to Petition for Writ of Certiorari

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May It Please the Court:

Respondents Continental State Bank of Big Sandy and Amerada Petroleum Corporation respectfully present this, their joint reply to the petition for certiorari, and urge that said petition be denied because:

1. No substantial federal question exists in the case.

2. No federal question was set up in the state court; nor was any such question noticed or decided by the court below.

3. The decision of the State Court of Civil Appeals, affirming the order of dismissal entered by the district court, was based upon independent and adequate non-federal grounds, involving questions of local practice and general principles of law.

Since the record has not been printed, and the typewritten copy on file is not available to respondents, the discussion herein will be based for the most part on statements appearing in the reported opinions of the state courts in this and companion cases, and in the printed petition for certiorari.

PRELIMINARY STATEMENT

Respondents believe that a brief statement with reference to the origin and development of the main title suit will lead to a clearer understanding of the published opinions therein, especially since petitioners did not participate in the original appeal and are not referred to in those opinions.

Respondent Bank originally owned the land in controversy and sold it to D. G. Pepper in 1926, taking a deferred payment note without any "cash down" payment. The foreclosure sale was made two years later, in April, 1928, and the bank became the purchaser thereat. In 1931, shortly after the discovery of oil in East Texas, the bank executed a mineral lease to respondent, Amerada Petroleum Corporation. About the same time, Pepper asserted title (claiming that the foreclosure sale was void for various reasons), and he executed a lease and royalty conveyance to one J. T. Eggleston. The original title suit, No. 7709 in the district court, was commenced in the spring of 1931, between Pepper and Eggleston on one side and these respondents on the other. In September, 1931, Eggleston transferred his lease to Joines, Anderson and Kaufman, and they intervened in the

pending suit. *D. G. Pepper v. Continental State Bank of Big Sandy, et al,* 60 S. W. (2d) 1089; *Continental State Bank of Big Sandy v. D. G. Pepper, et al,* 130 Tex. 71, 106 S. W. (2d) 654.

It appears from the allegations of petitioners' bill in the instant suit (No. 12,410-B), particularly paragraph IX thereof, that in August, 1931, petitioner, W. E. Floyd, and one J. E. Winans, under whom the other petitioners herein claim, "called on" Pepper and "explained" to him that he had been over-reached and defrauded by Eggleston, and that at such time a contract was made which provided in substance that Floyd and Winans should "clear the title" not only of the claims of these respondents but also of the claims of Eggleston and his assigns, and in consideration thereof Floyd and Winans were to receive from Pepper a lease and 1/2 interest in the royalty rights. It is alleged that the contract was placed in escrow "to be delivered to said W. E. Floyd and J. E. Winans upon performance of their part of said contract." (Bill, paragraph IX.)

Floyd and Winans subsequently became parties to Cause No. 7709, before the trial thereof, and they therein asserted the rights claimed under the above mentioned contract with Pepper, and asserted title on behalf of themselves and D. G. Pepper as against all other parties to the suit.

Pepper and Eggleston attacked the Floyd and Winans contract on the ground that it had been procured from Pepper by means of false and fraudulent misrepresentations. This raised the "secondary is-

sue" in the case in which, obviously, these respondents were not interested because it could make no difference to them whether Floyd and Winans, or Eggleston, had the better right under Pepper.

On the trial, Floyd and Winans were found guilty of fraud as charged, and their contract was cancelled by the terms of the judgment, but judgment on the main issue of title was rendered in favor of these respondents as against Pepper and all parties claiming under him. Floyd and Winans did not appeal from that judgment, but Pepper, Eggleston, Joines, Anderson and Kaufman did and the case was hotly contested on the merits through the state courts until June 16, 1937, when the judgment of the trial court was affirmed by the Supreme Court of Texas. See opinions above referred to. In the meantime, however, Floyd and Winans filed "several bills of review," one of which was dismissed voluntarily and two of which were dismissed in obedience to the writ of prohibition.

Without obtaining leave of the Supreme Court of Texas, petitioners, on June 23, 1938, filed this suit in the district court of Gregg County, to set aside the judgment theretofore rendered by said court in Cause No. 7709, which judgment had been affirmed by and made the judgment of the Supreme Court. *Continental State Bank of Big Sandy v. Pepper*, 130 Tex. 71, 106 S. W. (2d) 654. Not only had respondents failed to obtain leave from the Supreme Court of Texas to proceed in the premises, but they filed this suit in the face of an injunction theretofore issued against them by said Court in connection with

the similar suits previously filed (though on other alleged grounds of fraud) commanding petitioners to desist "from further interference with or hindrance of the judgment" attacked. *Continental State Bank of Big Sandy, et al, v. Floyd, et al,* 131 Tex. 388, 114 S. W. (2d) 530. In its opinion in the last mentioned case, referred to herein as the prohibition case, the court said:

> "The settled rule as to the authority of the Supreme Court to issue the writ of prohibition was clearly stated by Judge Harvey in Houston Oil Company of Texas v. Village Mills Company, 123 Tex. 253, 259, 71 S. W. (2d) 1087, 1089. He said: 'Where rights are established by a judgment of this court, the court has undoubted power to secure, by any proper writ necessary to the end, *the enjoyment of the rights so established.* Where a suit is brought in an inferior court, by any of the parties or privies to such judgment, against those in favor of whom the judgment was rendered, or their privies, and the suit directly involves the relitigation of rights established by the judgment, and is of such nature that, if successfully prosecuted, will result in a judgment which will purport the divesting of those rights, the prosecution of such suit will be prohibited as being *an interference* with the enforcement of the judgment of this court.'
>
> "See, also, Hovey v. Shepherd, 105 Tex. 237, 147 S. W. 224; Rio Bravo Oil Company v. Hebert, Tex. Sup., 106 S. W. (2d) 242.
>
> "Applying the foregoing rule to the facts of the instant case as above stated, we find that the suits which have been brought in the district courts of Gregg County, by the filing of petitions

somewhat in the nature of bills of review, are by the parties, and privies of the parties, to the judgment rendered in the district court of Gregg County (which judgment by its affirmance here became the judgment of this court) against those, and their privies in favor of whom that judgment was rendered, and that the two suits directly involve the relitigation of the principal and controlling issue in that case and of the rights established by that judgment; namely, the validity of the trustee's sale of the land to Continental State Bank of Big Sandy and the rights of the bank, and those who acquired interests in the land from it, *to hold and maintain their title and interests so acquired against the attacks and claims of Pepper and wife and those claiming under them.*" (114 S. W. (2d) 532-33) (Italics ours.)

* * * * *

"It is ordered that the writ of prohibition be issued commanding the respondents and each of them to desist from further proceeding with the said petitions filed in the Seventy-First district court and the One Hundred Twenty-Fourth district court of Gregg County, Tex., or with said suits, *and from further interference with or hindrance of the judgment of this court entered on January (June) 16, 1937, in Continental State Bank of Big Sandy,* et al v. *D. G. Pepper,* et al, 106 S. W. (2d) 654." 114 S. W. (2d) 533.

Upon the filing of the instant suit, these respondents presented to the trial court their motion to dismiss on two grounds, viz: (1) that the filing of the suit was, and the prosecution thereof necessarily would be, in direct conflict with and in disobedience of the restraining order and writ of prohibition issued

by the Supreme Court of Texas, and (2) that petitioners had not prosecuted their suit with required diligence. The motion was granted, and the order dismissing the case was affirmed by the Court of Civil Appeals at El Paso. *Floyd, et al v. Eggleston, et al,* 137 S. W. (2d) 182. Motion for rehearing was overruled by said Court of Civil Appeals without written opinion, and application for writ of error was denied by the Supreme Court of Texas, also without written opinion.

I.

NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

Dismissal of the case by the district court did not constitute a denial of "fundamental justice," or due process of law, within the meaning of the Constitution, because petitioners had undertaken to proceed without leave of the Supreme Court of Texas, which court had theretofore affirmed and made its own the judgment attacked. We understand the rule recognized by this Court to be as stated in *Obear-Nester Glass Co. v. Hartford-Empire Co.* (8th Cir.), 61 Fed. (2d) 31, 34, viz:

> "Where there has been no appeal, the defeated party may, in a proper case, and within proper time, on leave of that court first had and obtained, file in the trial court a bill of review. Where, however, the decree of the trial court has been appealed from and has been disposed of by the appellate court, either by affirmance or reversal, then the trial court may not entertain a

bill of review, nor permit it to be filed without leave first granted by the appellate court, because after decision by the appellate court, the decree of the lower court becomes the decree of the appellate court. The application for leave to file the bill of review in the instant case is, therefore, properly presented to this court. In re Potts, 166 U. S. 263, 17 S. Ct. 520, 41 L. Ed. 994; National Brake & Electric Co. v. Christensen, 254 U. S. 425, 41 S. Ct. 154, 156, 65 L. Ed. 341; Simmons Co. v. Grier Bros. Co., 258 U. S. 82, 42 S. Ct. 196, 66 L. Ed. 475; Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 43 S. Ct. 458, 67 L. Ed. 719; Hagerott v. Adams, 61 F. (2d) 35; Omaha Electric Light & Power Co. v. City of Omaha (C. C. A.), 216 F. 848; Society of Shakers v. Watson (C. C. A.), 77 F. 512; Suhor v. Gooch (C. C. A.), 248 F. 870. The application is addressed to the discretion of the court and is not to be granted as a matter of course."

II.

THE FEDERAL QUESTION NOW RELIED UPON WAS NOT SET UP IN THE STATE COURT

Petitioners concede that they did not, "in so many words," set up a federal question in the state court, but they assert (petition, p. 7) that the question of due process was raised by their "protestations against the fundamental injustice of allowing the said writ of prohibition to extend beyond the matters on which it was based." The only "protest" of this sort to which we are referred by petitioners (petition, pp. 22-23) is a sentence taken from an argument subjoined to

their motion for rehearing filed in the Court of Civil Appeals, which motion, as hereinabove stated, was overruled without written opinion.

The making of an argument that the instant suit does not constitute "interference with" the former judgment, or, if so, that the writ issued should be given no application because of the new ground of attack never before set up, was not sufficient to call to the attention of the court below the fact, if it be a fact, that petitioners were attempting to invoke the due process clause of the 14th Amendment.

The authorities cited by petitioners in support of the jurisdiction of this Court (p. 11) do not sustain them. In *Tumey v. Ohio* and *Truax v. Corrigan*, the federal question was specifically and "in so many words" set up in the court of first instance; and in *Ex Parte Baer*, the question involved related to the authority of a United States district court to issue a writ of habeas corpus under Sections 751-755, and 761, U. S. Revised Statutes (Comp. St., Secs. 1279-1283, 1289).

It is essential that the federal right claimed must have been specially set up in the state court.

28 U. S. C. A., Sec. 344(b);
Harding v. Illinois, 196 U. S. 78, 49 L. Ed. 394, 25 Sup. Ct. 176;
Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. Ed. 1149, 17 Sup. Ct. 1003;
American Surety Co. v. Baldwin, 287 U. S. 156, 53 Sup. Ct. 98, 77 L. Ed. 231.

And the federal question comes too late where raised for the first time in a motion for rehearing filed in the state court, if the motion is overruled without discussion.

Corkran Oil and Development Co. v. Arnaudet, 199 U. S. 182, 50 L. Ed. 143, 149, 26 Sup. Ct. 41;

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231.

III.

THE DECISION OF THE STATE COURT IS BASED UPON INDEPENDENT NON-FEDERAL GROUNDS ADEQUATE TO SUPPORT IT

(a) The Court of Civil Appeals held that this suit constitutes interference with the judgment attacked and that the injunctive writ issued by the Texas Supreme Court, prohibiting such interference, must be obeyed according to its terms until modified or vacated by that court. 137 S. W. (2d) 184. In so holding, the court followed literally the definition of the term "interference" as laid down by the State Supreme Court in the prohibition case (hereinabove copied, p. 5) and applied the generally accepted rule that an injunctive or restraining order issued by a court having jurisdiction of the parties and subject matter must be obeyed until vacated or modified by the court awarding it, or until the order or decree awarding it has been reversed on appeal or error. The authorities cited amply support the holding.

Herring v. Houston Natl. Exch. Bank, 113 Tex. 7, 255 S. W. 1097;
Conley v. Anderson (Tex. Sup.), 164 S. W. 985;
Ex Parte Kimberlin (Tex. Sup.), 86 S. W. (2d) 717, 721;
14 R. C. L. 470, Sec. 170;
32 Corpus Juris, 484, Sec. 833.

Obviously, petitioners' remedy was to apply to the Texas Supreme Court for such modification of the terms of the writ issued as would accord them the right to make another attack on the judgment in question on the "newly discovered" ground of bribery of two of the jurors. In *Herring v. Houston Natl. Exch. Bank*, supra, under similar circumstances, the Supreme Court of Texas said:

> "That this court had the jurisdiction and power to enter such judgment we have no doubt, and likewise that the act of securing the issuance of said writ of garnishment was a violation thereof. *If the terms of the order of injunction were broader and more far-reaching than respondents thought they should be, their remedy was by prayer for modification in motion for rehearing.*" (255 S. W. 1102) (Italics ours).

In their discussion of the "scope" of a writ of prohibition generally (Brief, pp. 20-21) petitioners ignore the essential difference between a writ issued to prevent a lower court from assuming to exercise a nonexistent jurisdiction and a writ directed to the parties restraining them from further interference with

rights established by a previous judgment of the higher court. The latter is an injunction binding upon the parties thereto in terms as framed by the court, so long as the same remains in effect.

(b) The Court of Civil Appeals also held that the doctrine of res judicata was applicable to petitioners' asserted right to attack the judgment on the alleged ground of bribery of two jurors. That holding is based on the following fact situation: The writ of prohibition was issued March 23, 1938, in general terms not only preventing further proceedings in the pending actions but broad enough to inhibit "further interference" by petitioners with the former judgment *on any ground.* On April 7, 1938, petitioners filed a motion for rehearing which the Court of Civil Appeals held to be "the legal equivalent of a petition by appellants (petitioners here) for such modification of the terms of the writ issued as would accord appellants the right to attack the judgment in Cause No. 7709 on new facts not theretofore pleaded or discovered." Presumably that motion is shown in the record now before this Court. It is copied in the appendix hereto, marked Exhibit "A". In such motion petitioners did not contend that the writ had been erroneously issued but they alleged that since the filing of their pending suits they had discovered "new and additional facts" establishing fraud on the part of the Continental State Bank (other than bribery of jurors), and they affirmatively prayed that they be given leave and opportunity to prepare an amended petition setting up such new facts, and of submitting same to the Supreme Court for its inspection, and that

they thereafter be permitted to file and prosecute such amended petition in the district court.* The new facts, but meagerly set out in the motion, were obviously insufficient to justify further litigation in the premises; but by the motion petitioners raised the issue of their right to proceed on grounds not theretofore known to or pleaded by them, and it was incumbent upon them to support their contention by every material fact then known to them or which might become available to them during the course of the proceeding.

The Supreme Court of Texas held the motion for rehearing under consideration until April 27, 1938, when it was overruled. It now appears, by allegation in the instant bill and statement in the petition for certiorari herein, page 13, that petitioners "discovered" the alleged bribery of two jurors on April 21, 1938. There was nothing to prevent the presentation of the facts concerning such alleged bribery to the court before it acted on the motion, by amended or supplemental motion. Indeed, it could have been done by a second motion for rehearing within a reasonable time after the overruling of the first. But petitioners took no action of that sort. Nor have they made any direct attack on the judgment in the prohibition case, by appeal to this court or otherwise. They simply ignored the injunction and filed another suit in the district court. The principle of law involved, widely

*The motion for rehearing was filed in the name of petitioner W. E. Floyd alone, but petitioners here state that "on April 7, 1938, your petitioners filed a motion for rehearing" in the prohibition case. (Petition, p. 13.)

recognized, is that a party may not litigate matters which he might have interposed, but did not, in a prior action between the same parties or their privies in reference to the same subject matter. The rule was stated by this court in *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U. S. 371, 60 S. Ct. 317, 84 L. Ed. ....., as follows:

> "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' Grubb v. Public Utilities Commission, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374, supra; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195, supra."

See also *Freeman v. McAninch*, 87 Tex. 132, 27 S. W. 97, 47 Am. St. Rep. 79; *McGhee v. Romatka*, 92 Tex. 38, 45 S. W. 552; *Waggoner v. Knight* (Tex. Com. App.), 231 S. W. 357; *Roy v. Scales* (Ind. App.), 132 N. E. 268; *Klinkert v. Streissguth*, 155 Minn. 388, 193 N. W. 687; and *Nuzzi v. United States Casualty Co.*, 121 N. J. L. 249, 1 Atl. (2d) 890.

The proposition now being pressed by petitioners is that they have the right to attack the judgment on

grounds not set up in their former suits, or known to them when those suits were filed. They urged the same proposition in the Texas Supreme Court, in another action, at a time when they knew as much about the alleged bribery of jurors as they know now, and it was ruled against them.

Petitioners, at least, should have given the Texas Supreme Court an opportunity to pass upon their allegations of bribery and, if same were found sufficient, to modify the broad terms of its injunction in such manner as to permit another attack on that ground.

(c) The Court of Civil Appeals further held that the order of dismissal was justifiable on the ground "that appellants had failed to prosecute their bill of review with diligence." An examination of this holding would involve a review of the testimony taken at the hearing on the motion to dismiss. We may state only a few of the significant facts appearing in this record.

The original judgment was entered by the district court in favor of these respondents on March 19, 1932, but the same was reversed by the Court of Civil Appeals at Texarkana on May 25, 1933, insofar as it denied recovery to Eggleston, Joines, Anderson and Kaufman, and judgment was rendered in favor of said last named parties for the mineral interests claimed by them, which constituted the chief value of the land. *Pepper, et al, v. Continental State Bank of Big Sandy, et al*, 60 S. W. (2d) 1089. The decision of the Texas Supreme Court, reversing the

Court of Civil Appeals and affirming the trial court was entered on June 16, 1937. So for a period of a little more than four years it appeared that Eggleston, Joines, Anderson and Kaufman were the victors in the litigation. In three bills filed during that time petitioners charged various acts of alleged fraud to Eggleston, Joines, Anderson and Kaufman, without in any wise implicating these respondents or either of them. It was only after the decision by the Supreme Court in favor of these respondents that fraud was charged to them, first in an amended bill filed in Cause No. 11,091-B on October 3, 1937, again in the motion for rehearing filed in the prohibition case on April 7, 1938, and finally in the instant bill filed June 23, 1938.

In the instant bill, the bribery of jurors is alleged to have been discovered on April 21, 1938. The bill itself was verified by petitioner Floyd on May 26, 1938, but it was not filed with the clerk until June 23, 1938.

At the hearing on motion to dismiss, held September 9, 1938, it was shown that when the suit was filed, the clerk was requested by petitioner Floyd to issue process for only three of the many defendants, to-wit, these two respondents and the Stanolind Oil and Gas Company, which operated the pipe line running oil from the premises. No other process had been issued nor had any of the other defendants been brought before the court by the date of the hearing. Petitioner Floyd was orally examined. He first testified that he had waivers of process signed by all of the other defendants except D. G. Pepper. Asked where such

waivers were, he replied: "That's my business." He was finally compelled to admit that he had no waivers. Asked why he had not filed the suit sooner after having sworn to the bill, he replied: "It wasn't handy." There was no further explanation. There was no showing by way of allegation in the bill or testimony taken at the hearing with reference to the circumstances under which the alleged bribery of jurors was discovered—more than six years after the trial—or why the same was not or could not have been discovered sooner.

A suit to set aside a judgment for fraud in the procurement is an equitable action, and it is required that the complaining party move with diligence and in good faith.

It has been repeatedly held that this Court will not undertake to review the judgment of a state court which is put upon a non-federal ground adequate to sustain it. *Fox Film Corp. v. Muller*, 296 U. S. 207, 80 L. Ed. 158; *S. W. Bell Telephone Co. v. Oklahoma*, 303 U. S. 206, 58 Sup. Ct. 528, 82 L. Ed. 751; *McCoy v. Shaw*, 275 U. S. 515, 72 L. Ed. 891; *Bilby v. Stewart*, 246 U. S. 255, 62 L. Ed. 701.

There was no federal question raised in the court below; but even if petitioners had there expressly invoked the due process clause of the Fourteenth Amendment, it cannot be said, in our opinion, that the non-federal grounds of the decision are so plainly unfounded that they may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question.

CONCLUSION

For the reasons herein discussed, Respondents respectfully pray that the petition for certiorari be in all things denied.

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